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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR,
KENNETH A. STEVENS, AND
CYNTHIA KOONCE MILLER,

Appellants,

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

Appellees.

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

BRIEF OF STATE APPELLEES

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BRIEF OF STATE APPELLEES

OPINION BELOW

The majority and dissenting opinions and the findings of fact of the three-judge District Court for the District of Maryland are reported at *Roemer v. Board of Public Works*, 387 F. Supp. 1282 (D. Md. 1974) and were

printed in the Appendix to the Jurisdictional Statement at pages A-1-A-51.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

The Maryland statute at issue here (Article 77A, §§ 65-69 of the Maryland Code) provides for a program of public aid to private colleges and universities in the State. The statute, as originally enacted in 1971, is printed at pages 12-15 of the Joint Appendix. The statute, as later amended and as it existed at the time of the decision below (the Maryland Act), is printed at pages A-52-A-56 of the Jurisdictional Statement.

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[1] Citation of abbreviations in this Brief refer to the following: "J.S." — Jurisdictional Statement; "J. App." — Joint Appendix; "Tr." — Trial transcript; "DX" — Defendant's Exhibit; "R." — Record.

QUESTIONS PRESENTED

1. Whether Maryland's program of general purpose aid grants to institutions of higher learning has the primary effect of advancing religion where less than one-fifth of the presently eligible colleges are demonstrably church-related but not pervasively sectarian?

2. Whether the Maryland college aid program necessarily fosters excessive government entanglement with religion simply because several church-related colleges are eligible and the aid is not restricted to one-time construction grants or to grants for similarly specific "inanimate" purposes?

3. Even if Maryland's college aid program should be found unconstitutional as heretofore applied to one or more of the appellee institutions, would such a holding justify striking down the statute and the entire program in the face of a clear severability clause?

4. If Maryland's college aid program is found constitutionally wanting, would this Court be justified in requiring the appellee institutions to refund monies paid to and received by them in good faith after the lower court's holding that the program was constitutional and after appellants' requests for injunctions had been denied?

STATEMENT OF THE CASE

A. *Proceedings Below.*

In 1972 the appellants, four Maryland taxpayers, instituted suit claiming that Maryland's program of aid to higher education violated the Establishment Clause of the First Amendment to the United States Constitution, as applied to the states through the Due Process

Clause of the Fourteenth Amendment (J. App. 6). Maryland's Board of Public Works, the three officials comprising the Board, and five out of eighteen colleges receiving State aid were named as defendants.[2]

The complaint alleged that a pervasive religious influence permeated the entire educational program of each of the defendant colleges and that all were "sectarian educational institutions" (J. App. 7-8). Alleging that the statute authorizing the aid program was unconstitutional on it face and as applied because such sectarian institutions were permitted to receive public funds, the complaint prayed that further administration of the aid program be enjoined and that the defendant colleges be required to refund grant monies theretofore paid to them.

A three-judge District Court was convened pursuant to 28 U.S.C. §§2281, 2284. Following the disposition of pre-trial motions (n. 2, *supra*) and extensive discovery conducted by the plaintiffs, trial commenced in May of 1973. Following the completion of that trial some four weeks later, and after considering nearly 2,000 pages of transcribed testimony, several hundred documents introduced into evidence and the extensive proposed findings of fact and legal memoranda submitted by the parties, the three-judge court heard oral argument and, on October 16, 1974, held that Maryland's aid program was constitutional (J.S., p. A-1). The court held that Maryland's program did not have the primary effect of

[2] Two organizations were included among the original plaintiffs, but their claims were dismissed for lack of standing. *American Civil Liberties Union v. Board of Public Works,* 357 F. Supp. 877 (D. Md. 1972). At the same time the plaintiffs' Free Exercise claim was dismissed for failure to state a claim. One of the original defendant colleges, Western Maryland College, is no longer party to these proceedings. See p. 9 n. 7, *infra*.

aiding religion and did not involve the State in excessive entanglement with religious institutions. The request for a refund of prior awards was denied. A dissenting opinion was filed by Circuit Judge Bryan (J.S., p. A-26). Separate findings of fact were entered by the court (J.S., p. A-35).

After the entry of judgment, appellants sought to enjoin any payments to the appellee colleges pending review of the lower court's decision by this Court. Both the District Court and this Court denied their requests for injunctive relief in November of 1974.

B. *Maryland's Aid Program.*

The initial statutory enactment providing for State aid to private higher education was passed by Maryland's General Assembly during its 1971 session and signed into law as Chapter 626 of the Laws of 1971 at a time when this Court had yet to directly address the First Amendment implications of public aid to church-related institutions of higher learning. Maryland did not have then, and does not have today, any general program of aid to private schools at the primary or secondary level. The 1971 statute provided for a program of non-categorical grants to private colleges and universities in Maryland to help ease the growing financial problems shared by those schools with private institutions of higher learning throughout the country. In 1972, at its first legislative session following this Court's decision in *Tilton v. Richardson,* 403 U.S. 672 (1971), the General Assembly passed a bill (introduced before the commencement of the proceedings below) amending the original statute so as to explicitly prohibit eligible institutions from using any of the public funds for "sectarian purposes". Md. Code, Art. 77A, §68A (Ch. 534 of the Laws of 1972). At the same

time, § 68 of Art. 77A was amended so as to direct (rather than merely authorize, as had previously been the case) the Board of Public Works and the Maryland Council for Higher Education (the Council) to "adopt criteria and procedures, not inconsistent with this subtitle, for the implementation and administration of the aid program . . ." By the 1972 amendments, the scope of those procedures was enlarged so as to specifically provide for the submission of reports or data "concerning the utilization of . . . [State] monies" by the eligible institutions.

While the aid program is jointly administered by the Board of Public Works and the Council, the principal administrative responsibility rests with the Council[3] which, as the lower court found, "has considerable expertise as to the character and programs of the State's institutions of higher education derived from its other responsibilities" (J.S., p. A-17). The Council was created by legislation enacted prior to the inception of the Maryland aid program and was charged with the responsibility for the overall coordination of higher education in Maryland to assure an adequate allocation of educational resources. Md. Code, Art. 77A, §§ 28-32. In fulfilling that overall responsibility, the Council has collected extensive information about private colleges and universities in Maryland and has studied and reported on programs and practices of those institutions entirely independently of its administrative authority and responsibilities under the challenged aid program (J.S., pp. A-8, A-17).

In administering the Maryland Act, the Council essentially engages in a three-level screening of

[3] The Council was not charged with any statutory responsibility for administering the aid program until the passage of the 1972 amendments (J. App. 14; Tr. 1499).

institutions seeking State Funds. The first level of inquiry involves consideration of whether an institution meets the statutory eligibility requirements, producing the elimination of any institution awarding exclusively theological or seminarian degrees.[4] The lower court noted that "[t]here has been no serious suggestion that institutions found eligible violate the [eligibility] standard[s] or that this determination entangles the Council in religion" and that several institutions have been disqualified from the aid program in this manner (J.S., p. A-47). The Council also seeks to determine at this stage whether the educational program of any institution seeking aid is principally religious in nature, and several colleges have been excluded from the aid program on the basis of such determinations (Tr. 1578-80; 1588-90).

The second level of screening occurs once an institution is found to be eligible under the program and a computation of its aid entitlement has been made pursuant to the statutorily prescribed formula.[5] At that point the president of the institution is required to certify under oath prior to receipt of any State funds

[4] In order to qualify for aid, the Maryland Act specifically requires that a college or university must (1) be non-profit and accredited by the Maryland State Department of Education; (2) have been in existence prior to July 1, 1970; (3) maintain one or more earned degree programs culminating in associate of arts or bacculaureate degrees; and (4) not award only seminarian or theological degrees. Md. Code, Art. 77A, § 66.

[5] The original statute provided for set annual grants of $500.00 for each bachelor's degree and $200.00 for each associate of arts degree awarded by eligible colleges (J. App. 13). The formula was modified in 1973 to allow for additional awards based on graduate level degrees (J.S., p. A-56). The current formula, as amended in 1974, bases the awards on the number of full-time equivalent students rather than on degrees awarded, Art. 77A, § 67 (J.S., pp. A-53-A-54).

that those funds will not be expended for sectarian purposes in violation of Section 68A (J.S., p. A-48).[6] Upon receipt of the required certification, the formula-determined funds are disbursed for utilization by the college or university.

Pursuant to the mandate of Art. 77A, § 68, each institution receiving aid is required to submit a report to the Council in the following year, detailing the purpose or purposes for which the State funds were expended. That report must be accompanied by a certificate under oath from the institution's president that the funds in question were not used for sectarian purposes. These verified "utilization of funds reports" submitted by the institutions are the primary vehicle by which the Council assures compliance with the statutory prohibition of § 68A against sectarian usage of State funds at this third and final level of the process (Tr. 1515-17). If an initial utilization of funds report lacks sufficient detail for an evaluation of whether the funds were spent only for lawful purposes, then the Council may seek, and has in the past sought, additional information (Tr. 1611-16, 1617-22). The Council also may request a State audit of the grant funds, if necessary, although the lower court found that "[t]he usage verification and the normal annual accounting which each college conducts" would make such an audit generally unnecessary (J.S., p. A-48). Even where such State audits might be necessary, the lower court found them to be "quick

[6] § 435 of Art. 27 of the Maryland Annotated Code defines the offense of perjury as including, *inter alia*, "an oath or affirmation, if made willfully and falsely in any of the following cases . . .: . . . in all affidavits required by law to be taken; . . . all affidavits required to be made to reports and returns made to . . . any officer of the government . . . ."

and non-judgmental" and capable of being accomplished in one day or less (J.S., p. A-48).

C. *Actual Experience under the Aid Program with Respect to Church-Related Institutions.*

As of the trial and decision below, there had been no actual experience in administering the present aid program (including the statutory prohibition against the use of funds for sectarian purposes) vis-a-vis church-related colleges and universities. In November of 1971, seventeen institutions were awarded approximately $1,700,000.00 for degrees conferred during the 1970-71 academic year (J.S., p. A-37). Of that amount, only $429,500.00 was awarded to the four appellee institutions.[7] Those awards were paid pursuant to the original 1971 version of the Maryland Act, which lacked the statutory prohibition against sectarian usage of funds, and at a time when the certification, accounting and reporting procedures later adopted by the Council pursuant to the 1972 statutory amendments were not yet in effect (Tr. 1499-1506).[8]

Following the commencement of the proceedings below, the State of Maryland determined that it would be appropriate to withhold and place in escrow further

[7] An additional $90,500.00 was awarded to Western Maryland College, a party to the proceedings below (DX 15; Tr. 1546). After this Court noted probable jurisdiction, appellants moved to dismiss Western Maryland College as an appellee.

[8] Appellants do not here seek any refund of these first year monies. Their refund claim is limited to the later payments of graduate program awards and of the escrow awards disbursed after the lower court's decision (appellants' brief, pp. 75-80).

grant monies intended for the eligible church-related colleges involved in the litigation pending a decision in the case by the three-judge District Court (J.S., p. A-37 n. 2). Except for the graduate program awards paid to Western Maryland and Loyola Colleges after trial and the entry of the single district judge's proposed findings of fact (R. 1399-1402), no State funds were paid to any church-related college or university until after the three-judge District Court had upheld the aid program and the appellants' applications for injunctive relief pending appeal had been denied.

Thus, the record below with respect to actual usage of first year funds and with respect to the manner in which Maryland officials have administered the program must be viewed in light of the fact that no public monies had ever been paid to church-related institutions of higher learning under the current version of Maryland's aid program.

D. *Nature of the Colleges Eligible for Aid.*

Less than one-third of the colleges and universities eligible to receive funds under the Maryland Act have ever been claimed by appellants to be church-related. Of the five institutions originally named in this case, one has since ceased operation altogether (Saint Joseph College) and a second (Western Maryland College) is no longer a party. It is thus fair to say that only three institutions of higher learning are now claimed by the appellants to be church-related. This is less than one-fifth of the total number of eligible institutions. There is no claim that the Maryland aid program is unconstitutional as applied to the numerous other colleges and universities which have continued to receive State assistance under the Maryland Act.

E. *Nature of the Appellee Colleges.*

After an extensive factual inquiry into the operation and nature of the appellee institutions,[9] the lower court found that none were prevasively sectarian but that all were church-related and conformed closely to the colleges approved in *Tilton v. Richardson,* 403 U.S. 672 (1971) (J.S., pp. A-3, 4, 10, 11). These Maryland colleges were contrasted with the more strongly sectarian South Carolina college receiving aid under the state statute upheld in *Hunt v. McNair,* 413 U.S. 734 (1973).

The appellee institutions have described in their respective briefs here in some detail the nature and extent of the particular evidence below which supports the generalized findings of the lower court as to each college. While no useful purpose would be served by duplicating those detailed analyses here, it is appropriate to summarize the various factual findings of the three-judge District Court with respect to the nature of Maryland's church-related colleges:

1. The colleges are not "so permeated by religion that the secular side cannot be separated from the sectarian" (J.S., p. A-38).

2. Religion "does not slant the conduct of classes" at these colleges (J.S., p. A-38).

3. ". . . [T]here is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom". The evidence does not

[9] In addition to the several hundred documents introduced into evidence at the trial, testimony was given by the presidents and staff and faculty members of each college, one expert witness on the teaching of religion at the college level and the staff member of the Council with primary responsibility for administering the aid program.

establish that "beginning a class with prayer in any way diminishes the atmosphere of intellectual freedom which marks these colleges . . . ." (J.S., p. A-34). The record contains "clear and convincing evidence that courses at each [of these colleges] . . . are taught 'according to the academic requirements intrinsic to the subject matter of the individual teacher's concept of professional standards'. *Tilton v. Richardson, supra,* 403 U.S. 681" (J.S., p. A-40).

4. The record does not reveal any significant faculty hiring bias based on religious considerations and the evidence indicates that the faculty members of each college are "professionals who value academic freedom and see no place for religious bias in liberal arts education . . . ." (J.S., p. A-41).

5. Religious indoctrination is not "a substantial purpose or activity" at any of the colleges and all of them are "characterized by an atmosphere of academic freedom rather than religious indoctrination" (quoting from *Tilton v. Richardson, supra*) (J.S., p. A-43).

6. While all of the institutions encourage spiritual interest to a degree, none of them "go beyond providing the opportunities and occasions for religious experience" (J.S., p. A-45).

The one particular respect in which the lower court was unable to find a clear absence of sectarianism was the manner in which theology and religion courses were taught and studied in these colleges. While specifically avoiding a finding that these courses were taught in a sectarian manner or other than as intellectual disciplines, the lower court applied a special burden of proof in this area and held that the *evidence was not sufficiently clear and compelling* to support a finding that the courses were taught as academic disciplines

(J.S., pp. A-13, 43, 46, 50). Finding the conduct of these courses readily separable from the remainder of the general college programs, the lower court held that the "sectarian purpose" prohibition of Art. 77A, § 68A should properly be applied by the State so as to prevent public monies from supporting the teaching of these particular courses (J.S., p. A-50).

SUMMARY OF ARGUMENT

The Establishment Clause Test

In order to evaluate claims that various statutes and governmental aid programs violate the Establishment Clause of the First Amendment to the United States Constitution, this Court has evolved a three-part "test" to be applied:

1. The statute or program must have a secular legislative purpose;

2. It must have a primary effect that neither advances nor inhibits religion; and

3. It must avoid excessive government entanglement with religion.

No claim is presented here under the Free Exercise Clause of the First Amendment and the appellants concede, as they must, that Maryland's aid program has a legitimate secular legislative purpose. Accordingly, this case focuses on the application of the primary effect restriction and the requirement that the State avoid any excessively entangling relationship with religion.

Application of these two tests, more appropriately described as frameworks for analysis of competing constitutional strictures, requires at the outset a realization that neither test imposes absolute requirements and that both present questions of degree not

susceptible of finite resolution. It is well established that the primary effect test does not bar any program which aids in some manner a religiously affiliated institution and that the excessive entanglement test does not prohibit all contacts and all relationships between the state and religious institutions.

Primary Effect

In order to demonstrate that the Maryland program of aid to higher education has a primary religious effect, it must be established that public monies either:

1. Are paid over to "an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in a religious mission"; or

2. Fund a "specifically religious activity in an otherwise secular setting". *Hunt v. McNair,* 413 U.S. 734, 743 (1973).

While appellants continue to urge, at least in passing, that the appellee institutions are permeated by religion, the thrust of their primary effect argument is that the Maryland aid program violates the second part of the test by funding specifically religious activities or by failing to provide adequate assurances that the funding of such activities will not occur. The pivotal focus in applying the primary effect test must be on the nature of the institution or institutions receiving public funds. The fact that the recipients of aid under the Maryland program are colleges rather than primary or secondary schools is critical both because of the age and nature of the student body and because of the manner in which these college level educational programs are conducted. If, as is the case here, the educational programs offered by the several church-related colleges receiving aid in

Maryland are characterized by a pervasive atmosphere of academic freedom and non-sectarianism, then the fact that they happen to be church-affiliated should not be held to place them in the same category as parochial primary or secondary schools. *Tilton v. Richardson,* 403 U.S. 672 (1971); *Hunt v. McNair,* 413 U.S. 734 (1973) Since their setting is "otherwise secular", it is necessary in order to defend the aid program only to show that it has not in fact aided any specifically religious activity and provides for sufficient safeguards to protect against the possible use of public funds for such a purpose.

The evidence below fails altogether to support any finding that specifically religious activities have been aided under the present Maryland program. Similarly, the combination of Maryland's explicit statutory prohibition against the use of any public funds for sectarian purposes and the procedures which have been established by the administering agencies charged with enforcing that prohibition represent adequate assurances that the possibility of such prohibited support occurring in the future is at most speculative. Such speculation cannot properly serve as the basis for any holding that the Establishment Clause is violated.

Excessive Entanglement

This Court has developed three factors which must be considered in determining whether the admittedly imprecise line between permissible involvement of the State in the affairs of a religious institution and impermissible excessive entanglement has been crossed:

1. The overall character and purposes of the institutions aided;

2. The nature of the aid provided; and

3. The resulting relationship between the government and the religious institution. *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971).

While no one of these factors can be considered in isolation from the others, the contrasting decisions of this Court with respect to aid to higher education and aid to parochial primary and secondary schools make it clear that the character of the institutions receiving aid is the controlling element of the equation. *Lemon v. Kurtzman, supra; Tilton v. Richardson, supra; Hunt v. McNair, supra.*

While the "nature of the aid" may assume a greater importance at primary or secondary schools with a dominant religious mission, the "ideological neutrality" of the type of aid is only of secondary importance in the context of a college environment characterized by an overall atmosphere of academic freedom. A classroom building, for example, is only as ideologically neutral as what goes on inside it. If the entanglement risks were minimal in periodically inspecting the uses to which the buildings in *Tilton* were put, then the risks must be equally minimal in inspecting the manner in which teachers use those some buildings in that same academic environment.

Similarly, the nature of the resulting relationship which emerges between the state and the private colleges receiving aid is largely determined by the fundamental character of those colleges. The mere fact that public monies may be paid in the form of annual operating expense grants rather than one-time construction grants does not necessarily increase the degree of entanglement. Indeed, a one-time construction grant program contains the seeds for even greater

entanglement since every dollar paid requires long-term scrutiny of the use to which the building is put. Annual operating expense grants, on the other hand, do not require any such long-term scrutiny.

Facial Validity of the Maryland Act

Should this court find any constitutional defect in the Maryland aid program as applied to one or more church-related colleges, then the unequivocal severability clause of the Maryland Act must be honored. *Tilton v. Richardson, supra; Sloan v. Lemon,* 413 U.S. 825 (1973). The severability clause here applies to the possible invalidation of payments as well as portions of the statute. Invalidating the Act as applied to one or more colleges should not jeopardize the right of the vast majority to continue to receive payments under the program.

Refund of Prior Grants

The appellants' request that the appellee colleges be required to refund grant payments made since the trial below is governed by the equitable principles enunciated in *Lemon v. Kurtzman,* 411 U.S. 192 (1973). Application of those principles requires a denial of any refund relief.

ARGUMENT

I.

INTRODUCTION: THE UNDERLYING ESTABLISHMENT CLAUSE TEST.

Over the years this Court has articulated a three-part test to be applied in resolving the constitutional issues involved in Establishment Clause cases. That "clearly

stated, if not easily applied" test requires Maryland's college aid program to satisfy three conditions:

> ". . . First, the statute must have a secular legislative purpose. E.g., *Epperson v. Arkansas*, 393 U.S. 97. Second, it must have a 'primary effect' that neither advances nor inhibits religion. E.g., *School District of Abington Township v. Schempp*, 374 U.S. 203. Third, the statute and its administration must avoid excessive government entanglement with religion. E.g., *Walz v. Tax Comm'n*, 397 U.S. 664." *Meek v. Pittenger*, ___ U.S. ___, 43 U.S.L.W. 4596, 4598 (May 19, 1975).

While the basic elements of this three-part test have their origins in earlier decisions of this Court, the test's application to programs of aid to higher education is of recent vintage. Despite the fact that this Court has consistently invalidated programs of aid to primary and secondary education since 1971,[10] during that same period it has sustained the only two programs of aid to colleges and universities that have been before it for review. *Hunt v. McNair*, 413 U.S. 734 (1973) and *Tilton v. Richardson*, 403 U.S. 672 (1971).[11]

While application of the three-part test may often be difficult, the test itself is a carefully articulated

[10] E.g., *Meek v. Pittenger, supra* (textbook loan program upheld; other aid programs invalidated); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); and *Lemon v. Kurtzman*, 403 U.S. 602 (1971),

[11] In addition, on the same day that the tuition grant program for primary and elementary school students was invalidated in *Committee for Public Education v. Nyquist, supra*, this Court declined to review a decision upholding a program of loans to college students. *Durham v. McLeod*, 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dism'd for want of a substantial federal question*, 413 U.S. 902 (1973).

embodiment of the fundamental proposition that the First Amendment does not command the erection of an absolute "wall of separation" between church and state (as was once thought), but rather requires the state to follow a neutral course of action in matters touching upon religious affairs. In more recently rejecting any rigid application of the metaphysical "wall" standard, the Court has stated that the principle of neutrality requires a "line of separation [which], far from being a 'wall', is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). "The problem, like many problems in constitutional law, is one of degree." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

Under the primary effect prong of the Establishment Clause's neutrality doctrine, it is well established that a government aid program may constitutionally have certain incidental or secondary beneficial effects on church affiliated institutions.[12] Were this not the case, then neither church-related educational institutions nor their students could ever participate in or benefit from any public aid program. As was pointedly observed by this Court in *Hunt v. McNair*, 413 U.S. 734, 742-3 (1973):

> ". . . Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected . . . Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an

[12] In *Meek v. Pittenger*, ___ U.S. ___, 43 U.S.L.W. 4596, 4602 (May 19, 1975) the primary effect test was described as requiring a determination of whether an aid program "necessary results in the *direct* and *substantial* advancement of religious activity." (Emphasis supplied).

institution frees it to spend its other resources on religious ends."

The argument that every form of financial aid to church-sponsored activity violates the Establishment Clause was characterized in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971) as being "simplistic" and having been "rejected long ago."

Just as the word "primary" cannot be read out of the primary effect test, so too must the word "excessive" be given its proper emphasis in any excessive entanglement analysis. "Some relationship between government and religious organizations is inevitable". *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). "The complexities of modern life inevitably produce some contact" between church and state. *Walz v. Tax Commission*, 397 U.S. 664, 676 (1970). As in the case of the *primary* effect test, determination of whether the relationship is *excessively* entangling is a question of degree and not of absolutes. The very words themselves ("primary" and "excessive") are clearly words of degree which neither contemplate nor permit a rigid or doctrinaire approach to the problem, and the tests of which they are a part must be viewed as constituting the appropriate framework of analysis for the issues rather than criteria to be applied in an unyielding or automatic fashion. The Court has repeatedly recognized this in its recent decisions in this area.

Indeed, both the very nature of the interplay between the Free Exercise and Establishment clauses of the First Amendment, and the relationship within the Establishment Clause issue of the primary effect and excessive entanglement tests themselves, require the disavowal of an absolutist approach, If the primary effect test, for example, were to require the absence of

any secondary or indirect effect beneficial to religious institutions, then as a practical matter governmental aid programs would either *necessarily* require an excessively entangling degree of governmental oversight (to assure the absence of such an effect) or would have to exclude altogether any program with church ties or sponsorship. Such a result would be clearly inconsistent with the underlying principle of governmental neutrality and would lead inevitably to an anti-religion result not contemplated by the framers or by this Court's decisions under the First Amendment.[13]

The brief filed on behalf of Loyola and Mount Saint Mary's Colleges contains a thorough analysis of the evolution of the primary effect and excessive entanglement tests as applied in Establishment Clause decisions of this Court over the years. While it is neither appropriate nor necessary to repeat that analysis at length in this brief, it is not possible to avoid some repetition if the arguments advanced by the State are to be presented in their proper context. We trust that where such duplication occurs it will be recognized as unavoidable, and that where an argument made in the brief of these colleges is not repeated here, the Court will recognize that fact as an effort to avoid duplication

[13] Undeniably, pervasively sectarian schools and other pervasively sectarian church-operated programs may not be the recipients of a broad range of government aid as a consequence of the interplay or tension between the primary effect and excessive entanglement tests. This is so because it is impossible to separate the secular from the sectarian elements of these programs and that to even attempt to do so would necessarily involve excessive entanglement. To say that this same result should follow in a program which is religiously sponsored or affiliated but is not pervasively sectarian would make a mockery of the often stated proposition that the state and federal governments are barred by the First Amendment from inhibiting religion just as they are barred from advancing it.

and not as an indication that the State does not subscribe to or recognize the importance of the argument.

II.

THE MARYLAND ACT DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

A. *The General Principles*

In order to demonstrate that Maryland's aid program has the primary religious effect prohibited by the First Amendment to the United States Constitution, appellants must establish that State aid "flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or . . . [that] it funds a specifically religious activity in an otherwise secular setting." *Hunt v. McNair,* 413 U.S. 734, 743 (1973).[14] In essence, for purposes of the two-part primary effect test, the nature of the institution and its educational program is thus the critical element in the equation. If religion pervades a school or college to the extent that a substantial portion of its educational functions are subsumed in a dominant religious mission, then governmental funds may not be paid to that institution for any purpose whatsoever. If, on the other hand, the school or college either has no church ties at all or fits the characterization of the colleges discussed in *Tilton v. Richardson,* 403 U.S. 672 (1971), and *Hunt v. NcNair, supra,* then public funds may be paid so long as they do not fund any specific religious activity.

[14] Appellants concede that the Maryland Act has a legitimate secular legislative purpose, thus eliminating the need for any discussion here of the first element of the three part test.

Notwithstanding the appellants' effort to argue that the appellee colleges here are permeated by an excessive religious influence, it is clear under any reasonable view of the extensive evidence and the decision of the lower court that the resolution of the primary effect issue in this case turns on a determination as to whether State monies are funding "specifically religious activity" at Maryland's church-related private institutions of higher learning.

B. *Importance of the Setting: The Nature of the Appellee Colleges*

As noted earlier, this Court has only considered two previous cases involving government aid programs directed at colleges and universities. The principle was first articulated in Chief Justice Burger's plurality opinion in *Tilton v. Richardson,* 403 U.S. at 685, that

> ". . . there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools"

and that these differences must be given prominent consideration in determining the constitutionality of any program of aid to higher education. This basic proposition was later reaffirmed in *Hunt v. McNair,* 413 U.S. 734, 746 (1973) (which also involved an aid to higher education program) and *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756, 777 n. 32 (1973) (which did not).

The difference between church-related colleges and pre-college church schools is not an absolute or categorical difference which necessarily requires *all* colleges to be treated differently from *all* primary and

secondary schools. Rather, the distinction is one based upon the greater degree of maturity of the average college student and upon the fact that church-related colleges, both in recognition of the maturity of their student bodies as well as for other reasons, ordinarily serve an entirely different function from the point of view of the churches with which they are affiliated. In essence, most churches which have become involved in the business of education consider any effort at religious indoctrination in an educational setting to be appropriate, if at all, only at the lower age levels. Conversely, most church-related colleges and universities consider their basic function to be educational or academic rather than religious. The reasons for this substantial and critical difference in approach were identified in Chief Justice Burger's plurality opinion in *Tilton v. Richardson, supra,* as follows:

> "The 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.' . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination . . . The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Finally, many church-related colleges and universities seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom." 403 U.S. at 685-86.

Having found the four Catholic colleges involved in the *Tilton* case to be "institutions with admittedly religious

functions but whose predominant higher education mission is to provide their students with a secular education" (403 U.S. at 686-87), the Court concluded that:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities." 403 U.S. at 687.

We do not mean to suggest that all church-run or church-related colleges correspond to those considered by the court in *Tilton*. Some may indeed be as pervasively sectarian as any church-run primary or secondary school. But the fact remains that most are not, and that the church-related colleges receiving money under the Maryland aid program are not. The appellants bore the burden of demonstrating the contrary and failed to so.[15]

In considering the correctness of the lower court's holding that the appellee colleges conform closely to the colleges discussed by this Court in *Tilton v. Richardson,* it must be emphasized that various religious indicia found in an educational setting are properly of substantially less concern at the college level than would be the case in a primary or secondary school. It is implicit in Chief Justice Burger's observations in *Tilton v. Richardson* that a teacher in religious garb, for example, will have a substantially different impact on a classroom of first graders than on a classroom of

[15] The "burden rests on appellant [plaintiff] to show the extent to which the College is church-related, cf. *Board of Education v. Allen,* 392 U.S. at 248, 20 L. Ed. 2d 1060 . . . ." *Hunt v. McNair,* 413 U.S. 734, 746 n. 8 (1973).

college sophomores. Religious symbols which may have a significant effect on young children cannot possibly have the same influence on the college student. The "less impressionable" nature and heightened "skepticism" of the college students themselves, as well as the internal discipline and encouragement of critical responses inherent in courses taught at the college and post-graduate levels in an atmosphere of general academic freedom, significantly alter the impact and importance of such isolated religious trappings. Indicia of the church's "presence" in an institution cannot be examined out of the context of the nature and overall character of the institution itself. The evidence is overwhelming in this case that Maryland's church-related colleges are characterized by an atmosphere of academic freedom and are not pervasively sectarian.

C. *Application of the Primary Effect Test*

Since no church-related college receiving money under Maryland's aid program is demonstrably so pervasively sectarian that a substantial portion of its educational function is subsumed in any religious mission, it becomes necessary to focus on the second part of the test identified in *Hunt v. McNair, supra* — whether the aid program "funds a specifically religious activity in an otherwise secular setting." There are essentially two ways in which the burden of proving such a primary effect can be met. The first of these ways —`showing that State funds in fact have been used to directly support specifically religious activity — is simply not available to appellants here. The only State funds ever disbursed to and used by any of the appellee institutions at the time of the trial below were the initial 1971 awards payable under the original version of the Maryland Act. These payments were made prior to the adoption of the explicit statutory

prohibition against the use of funds for sectarian purposes and prior to the development of the present administrative machinery for enforcing that prohibition. Thus, even if the record here contained clear evidence of a use of *those* funds for a specifically religious activity (which it does not), that would have no bearing on the constitutionality of the *present* aid program.

The finding of the lower court that three institutions commingled their first year grants with general college operating funds (J.S., p. A-50) can hardly be used to strike down the present statute, especially in light of the fact that one of those colleges has since ceased operating, the other is no longer a party, and the overall educational program of all three is no less characterized by an atmosphere of academic freedom than that of the others. Even if expeditures of first year grants were relevant, a commingling of those monies shows nothing more than that it is possible that they were used to fund some specifically religious activity. Such a mere possibility with respect to funds dispensed under a previous version of the Maryland Act would be a slender reed upon which to now invalidate the entire program in its present form.

The second way in which funding of specifically religious activity can be shown is to demonstrate the absence of safeguards against such a result. This requires far more than the kind of speculation engaged in by appellants. The lower court here, in properly declining to engage in this kind of speculation, referred to this Court's observation in *Tilton v. Richardson,* 403 U.S. 672, 679 (1971) that:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement . . . But judicial concern about

these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."

This judicial admonition against such speculation is, of course, entirely consistent with the holding in the *Tilton* case that the possibility of religious use of a governmentally financed structure after the expiration of the 20 year prohibition against such use was constitutionally unacceptable. While the actual religious use of such a building was indeed only a possibility, *it was a certainty that the use restriction would cease* to exist altogether in 20 years. Thus, it was the *combination* of the possibility of religious use with the certainty of the ultimate absence of any prohibition which was fatal to the durational limitation.

The prohibition in the Maryland Act against sectarian use of funds is permanent and without limit. The lower court found that the administering body "clearly understands that sectarian use is forbidden, no matter when it occurs" (J.S., p. A-49). There is no substantive or constitutionally significant distinction between Maryland's statutory prohibition and the similar prohibitions involved in *Hunt v. McNair,* 413 U.S. 734 (1973) and *Tilton v. Richardson, supra* (absent the 20 year limitation which is not present in the Maryland Act), and no apparent reason why the one should be less effective than the others.[16]

[16] The statutory prohibition involved in *Tilton* (20 U.S.C. § 751(a)(2)) excluded from the wide variety of academic facilities otherwise eligible for construction grants or loans "any facility used or to be used for sectarian instruction or as a place for religious worship or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or a department of divinity . . . ." The statutory prohibition in *Hunt v. McNair* was virtually identical.

The holding below that there are sufficient safeguards in the Maryland aid program to insure that funds are not diverted to support religious activity was not grounded solely on the statutory prohibition. The lower court also pointed to the prohibition against support of seminarian or theological degree programs, to the two certifications under oath of non-sectarian usage required each year of the president of each institution receiving aid, and to existing accounting procedures and the authority of the State to perform a public audit in the unlikely event that one should be necessary (J.S., p. A-12). The Court also cited in its findings of fact the general knowledge of the programs and operation of all Maryland colleges and universities which the Maryland Council for Higher Education acquires independently as a result of its other duties, the Council's practice of requiring additional follow-up data, where necessary, in conjunction with the post-expenditure verification, and the ability of the Council to adopt other follow-up procedures pursuant to the basic statutory mandate in order to insure that no State funds are initially used for sectarian purposes or later converted to such sectarian usage.

In order to conclude that these safeguards are inadequate, this Court would have to begin by assuming that the presidents of the appellee colleges will either fail to comprehend what is encompassed within sectarian usage of funds or will periodically give false oaths. Both assumptions appear to be foreclosed by the explicit refusal of the Court in *Board of Education v. Allen,* 392 U.S. 236, 245 (1968), to "assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not

honestly discharge their duties under the law."[17] There is no evidence in this case which suggests in any way that Maryland's colleges or college presidents are not able to make these kinds of distinctions or that they will not honestly discharge their duty to do so under the Maryland Act.

Moreover, and in recognition of the fact that it would be inappropriate to rely *solely* on the good faith of the aid recipients, the State has required, and will continue to require, additional follow-up data with respect to the actual usage of funds when such data is necessary. And the State possesses the authority to conduct what the lower court found to be a "quick and non-judgmental" post-audit analysis and accounting review under those limited circumstances where such review may be warranted. These steps are taken and these powers are available not because the State does or should assume that college presidents are either incompetent or dishonest, but because it bears the ultimate responsibil-

[17] It is hardly any more difficult for a college president to distinguish between secular and religious usage of educational grant funds generally than it is to distinguish between secular and religious books. The fact that Maryland's utilization of funds reports must be given under oath (or affirmation) places an even greater incentive on their fairly making such distinctions and "honestly discharg[ing] their duties." This essentially places the *initial* burden on the college itself to restrict its expenditure of State funds to clearly non-sectarian aspects of its program and to develop on its own initiative internal accounting procedures upon which the college president can comfortably rely when he files his post-expenditure certification. The placement of this initial burden on the colleges themselves is reflected in the requirement of the Council that each college adopt and maintain such internal accounting and administrative procedures as are necessary to insure that state monies are not used for sectarian purposes (Tr. 1509-1510).

ity of assuring compliance with both the statute and the First Amendment.[18]

In short, there is no basis in the record for finding that the responsible State agencies either have been, or will in the future be, lax in their enforcement of the sectarian usage prohibition, and the lower court quite properly declined to engage in speculation to the contrary.

D. *The Maryland Program Should Not Be Overturned on The Basis of Speculation*

Any effort by the appellants to establish the inadequacy of the State's enforcement mechanism must, of necessity, be grounded not only on an inherent distrust of both college and State officials, but on speculation and some remote possiblity as opposed to either fact or probability. This Court should not accept appellants' invitation to imagine that it is looking back over five or ten years of administration of a state aid program to church-related colleges when the fact of the matter is that it is being urged to overturn an aid program which, in its present form and insofar as the record below is concerned, has never provided a single dollar to any church-related college. While the State strongly urges that no unconstitutional expenditures have been shown (in the first or any other year of the program) and that the administrative mechanisms established in the course of processing payments to colleges totally

[18] The oversight role of the State simply reflects a recognition of the fact that while neither it nor the courts should assume that school officials will not honestly discharge their duties, the State should not rely *entirely* on the good faith of others. *Meek v. Pittenger*, ___ U.S. ___, 43 U.S.L.W. 4596, 4602 (May 19, 1975); *Lemon v. Kurtzman*, 403 U.S. 602, 618-619 (1971).

lacking any church affiliation are constitutionally sufficient to protect against possible improper use of funds by any college, to hold that the primary effect test has not been satisfied here would be to answer a hypothetical question on the basis of assumptions and possibilities rather than on the basis of any facts supported by the record below.[19]

In *Wheeler v. Barrera,* 417 U.S. 402 (1974) this Court was asked to consider the question of whether the Establishment Clause prohibits a state from sending public school teachers into parochial schools to teach remedial courses in order to provide comparable educational services pursuant to Title I of the Elementary and Secondary Education Act of 1965. Just as the Court of Appeals had done below, this Court declined to pass on the question on the grounds that

> ". . . it is possible for the petitioners to comply with Title I without utilizing on-the-premises parochial school instruction. Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated.
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> ". . . A federal court does not sit to render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding." 417 U.S. at 426-27.[20]

[19] The procedures which have actually been developed thus far are, of course, not hypothetical. The appellants, in essence, ask this Court to overturn both the statute and the procedures as a matter of law on the grounds that they will necessarily prove inadequate over time and that the administrative machinery is not capable of responding to the requirements of the First Amendment.

To the extent that any finding that Maryland's existing administrative machinery is not adequate to insure compliance with the statutory prohibition is justified, this Court should decline to overturn the Maryland aid program and afford to State officials the opportunity to further develop any additional procedures thought necessary in the context of actually distributing public monies to church-related institutions.

A somewhat analogous approach was taken by the lower court here in the one area in which it was unable to conclude that the educational programs of the appellee institutions were characterized by the generally prevailing atmosphere of academic freedom. Based upon an apparent reversal of the customary burden of proof in Establishment Clause cases, the court said that it was "unable to characterize" the religion and theology courses taught at the appellee institutions and that there was no "clear indication" that these programs were taught as academic disciplines (J.S. p. A-13).[21] Eschewing any conclusion that these courses were *not* taught as academic disciplines, the Court

[20] Later, in *Meek v. Pittenger,* ___ U.S. ___, 43 U.S.L.W. 4596 (May 19, 1975), the Court confronted this precise issue on the basis of real and not hypothetical facts and held that the Pennsylvania auxiliary services program for primary and secondary schools violated the Establishment Clause.

[21] Ordinarily the burden of proving that a government aid program has not invalidated primary effect is placed squarely on those challenging it. *Hunt v. McNair,* 413 U.S. 734, 746 n. 8 (1973); *Board of Education v. Allen,* 392 U.S. 236, 248 (1968).

nonetheless found that "a possibility existed that these courses *could* be devoted to deepening of religious experiences in the particular faith rather than to teaching theology as an academic discipline" (J.S., p. A-13) (emphasis supplied). Because of this possibility, the Court ruled that

> "The Act must be administered so as to prevent any state funds from supporting the religious studies or theology programs at any institution. 'Sectarian purposes,' as that term is used in Art. 77A, § 68A, must be interpreted as encompassing the study of religion or theology." (J.S., p. A-50).

After noting that the Council had not thus far taken steps to administer the program in that fashion, the Court quite properly chose the option of directing the Council to do so rather than striking down the statute as unconstitutional, noting this Court's observation in *Tilton v. Richardson,* 403 U.S. 672, 679 (1971) that judicial concern about the possibility of the legitimate objectives of a law being subverted by lax enforcement would not, standing alone, justify striking down the law as unconstitutional.[22]

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[22] For apparently analogous reasons, the lower court observed elsewhere in its opinion that "[t]he procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years" (J.S., p. A-18). Noting the absolute statutory prohibition against sectarian usage and the Council's demonstrated awareness of its responsibilities in the matter, the Court expressed itself as being "satisfied that adequate, non-entangling follow-up procedures will be developed" (J.S., pp. A-18, A-19).

III.

THE MARYLAND ACT DOES NOT FOSTER AN EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION.

A. *The General Principles*

As this Court has previously noted, some relationship and contact between the government and religious organizations is inevitable. *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Walz v. Tax Commission,* 397 U.S. 664 (1970). The Constitution does not require the absence of all such relationships or contacts, but requires only that the government avoid *excessive* entanglement with religion. The test "is inescapably one of degree". *Walz v. Tax Commission, supra,* at 674.

The difficulty of determining whether a particular church-state relationship constitutes permissible involvement or excessive entanglement is compounded by the obvious tension which exists between the requirements of the primary effect test and the prohibition against excessive entanglement. On the one hand, an aid program must contain sufficient safeguards to assure that public monies awarded to a church-related college will not fund its religious activities. Requiring such safeguards necessarily demands a degree of governmental oversight with respect to the manner in which those funds are expended, thus inevitably creating some involvement of public officials in the affairs of the college receiving the funds. The thrust of the excessive entanglement prohibition is that such governmental oversight or administrative supervision must not be excessive or too deeply enmesh the government in the affairs of a church-related college.

Whether the line between permissible involvement and excessive entanglement has been crossed requires an analysis of three factors which this Court has previously identified: "the character and purposes of the institutions that are aided, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority". *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971).

B. *The Importance of the College Setting*

A careful analysis of the *Lemon* decision and others involving primary and secondary schools, as well as a consideration of this Court's decisions in the higher education cases *(Tilton v. Richardson,* 403 U.S. 672 (1971) and *Hunt v. McNair,* 413 U.S. 734 (1973)), makes it clear that the first of these factors — the character and purposes of the schools — is the decisive element in the entanglement analysis. As this Court observed in *Hunt v. McNair:*

> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement . . . varies in large measure with the extent to which religion permeates the institution." 413 U.S. at 746.

The Court's conclusion in *Hunt* that the South Carolina aid program did not engender excessive entanglement rested chiefly on its conclusion that "there is no evidence here to demonstrate that the college is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton." Id.*

The plurality opinion in *Tilton v. Richardson,* 403 U.S. 672 (1971) had stressed the importance of the nature of the educational institution involved in applying both the primary effect and entanglement tests as follows:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive goverment surveillance is diminshed and the resulting entanglements between government and religion lessened." 403 U.S. at 687.

C. *The Nature of the Aid*

The lesson of *Tilton* and *Hunt* was not lost on the lower court here, which discussed the importance of the institutions' character and the relationship between that factor and the nature of the aid involved in the following terms:

> "What emerges from a consideration of these cases is the conviction that the ideological neutrality of a particular program of aid is dependent on the type of institution being benefited. The classroom buildings provided in *Tilton* and *Hunt* are no more neutral in the abstract than the classroom buildings which were maintained with public funds in *Nyquist.* The classes taught in the *Tilton* and *Hunt* classrooms are no more neutral than the classes taught by publicly subsidized teachers in *Lemon,* all other things being equal. Obviously, all other things are not equal. What would be impermissible in an institution staffed by members of a particular faith, administratively controlled by a religious body, and dedicated to the inculcation of a particular faith, may well be permissible in an autonomous institution staffed by faculty hired on the basis of academic merit, where academic freedom prevails, and where courses are taught in accordance with the requirements of an academic discipline. The Court could validly require that the state monitor the content of teaching at the

primary or secondary level to prevent even inadvertent lapses into religious indoctrination on the part of publicly subsidized teachers. Yet the Court could conclude that such monitoring would not be necessary at a college which maintained its academic freedom and integrity." (J.S., pp. A-15, A-16).

Plain logic supports the correctness of emphasizing the extent to which religious indoctrination or a religious mission is a part of the educational program of a church-related college. While not in the least suggesting that the nature or type of aid is constitutionally irrelevant, it must be readily apparent that both inanimate objects (such as textbooks and classroom buildings) as well as distinctly animate objects (such as teachers) cannot reasonably be assigned an ideological or non-ideological character without considering them in the context in which they function. Perhaps the best way to illustrate this is to consider the nature of the construction aid involved in *Tilton v. Richardson, supra.*

While it may be true that a building in and of itself is non-ideological in nature, it is apparent from the *Tilton* decision that what matters is the use to which the building is put. Were this not the case, the Court would not have stricken the twenty year limitation on the religious use prohibition contained in the *Tilton* statute. Quite clearly the Court not only permitted but required continuing inspection and surveillance of the uses to which the buildings were put. And the Court held that "[i]nspection as to use is a minimal contact." 403 U.S. at 688. If this is so, then it must be primarily because of the nature of the colleges at which the buildings were constructed. Obviously buildings are used by people. It is what people do in them that determines their use. The focus of our concern must be on the use which is made

of those buildings by teachers and others employed by the college to administer the educational program.

The particular buildings involved in *Tilton* included two libraries, a language laboratory, a science building, and a music, drama and arts building.[23] The discussion (in the primary effect portion of the opinion) of the use to which these buildings were put clearly indicates the critical importance of the character of the institution and the extent to which its teachers operate in an environment of academic freedom.

The only way to reconcile *Tilton v. Richardson* and *Lemon v. Kurtzman,* 403 U.S. 602 (1971), decided on the same day, is to conclude that whatever importance may be attached to the ideological or non-ideological character of the aid in a school with a primarily religious mission, the "nature" of the aid in the isolated sense of the term is of secondary importance in scrutinizing a program of aid to church-related colleges possessed of the characteristics present in *Tilton.* Can it be seriously contended that the result in *Tilton* would have changed if public funds had been allocated to pay the salaries of the chief librarians in the two libraries, the heads of the French and German Departments, the faculty members of the Chemistry and Physics Departments and the Music instructor and production manager of the Drama Department? In light of the fact that these very people would be the ones putting the buildings in question to their intended uses, it is difficult to perceive why scrutiny of the *use of the buildings* would be character-

[23] While none of these buildings were general classroom buildings, that fact cannot be accorded constitutional significance. The federal statute did not exclude classroom buildings from the category of eligible academic facilities. In *Hunt v. McNair,* state aid was extended to various buildings not identified in the court's opinion.

ized as an acceptable minimal contact and yet scrutiny of the *use to which the buildings were put by college personnel* would be considered unacceptable and excessive. Clearly the reason why both forms of aid are constitutionally acceptable turns on the nature of the institutions themselves and the fact that religious indoctrination was not one of their substantial purposes or activities.[24]

While it thus must be clear that government payments of salaries of faculty members staffing the *Tilton* buildings would be constitutionally acceptable, it is equally clear that state aid paying the salaries of those same types of school personnel working in the primary and elementary schools involved in *Lemon v. Kurtzman* would be constitutionally unacceptable. The reason for this was made clear in the Court's opinion in *Lemon v. Kurtzman:*

> The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith . . . . Inevitably some of the teacher's responsibilities hover on the border between secular and religious orientation . . . . [A] *dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenents, will inevitably experience great difficulty in remaining religiously neutral* . . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine." 403 U.S. at 618-19. (Emphasis supplied).

[24] The Court's later opinion in *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), further reinforces the view that the character of the school determines the ideological or non-ideological nature of the aid. In sharp contrast to the result reached as to the bricks and mortar aid in *Tilton,* the Court in *Nyquist* noted:

> "No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible within the context of these religion-oriented institutions* to impose such restrictions." 413 U.S. at 774. (Emphasis supplied).

Obviously the fact that the school personnel involved may be librarians, language or science teachers or instructors in the arts does not insulate them from the influence which affects teachers generally at a school operated to inculcate religious views. The acquisition of books can be religiously influenced; science teachers from Galileo to Scopes can attest to the tensions which may exist between religion and the sciences; music and drama are readily susceptible to a religious slant; and even the teaching of foreign languages can be subtly used as a tool to reinforce particular religious views, notwithstanding the suggestion to the contrary in the *Tilton* plurality opinion. While all of these possibilities exist at a pervasively sectarian school, particularly at the primary or secondary level, when these activities are undertaken at the college level and in an atmosphere where the basic tenents of academic freedom prevail, the possibility becomes so remote and speculative that the degree of "use inspection" required is minimal and constitutionally acceptable.

General-purpose grants have distinct advantages over special-purpose grants in terms of Maryland's overall educational policies and goals. A general-purpose grant affords the recipient considerable flexibility, permitting the college to use the grant funds where it finds the need most compelling, so long as the statutory and administrative restrictions are complied

with.[25] This flexibility is lacking when an aid program restricts the use of grant funds to specified purposes such as construction.[26] The general-purpose grant program challenged in this case aids the State in realizing its goal of preserving a viable system of private colleges and universities by permitting each college to meet its own particular needs or to develop its own special educational resources more effectively. A rigid, and we suggest, unjustified, adherence to the "nature of the aid" as a controlling factor in judging a college aid program would defeat this legitimate policy of individualized flexibility without furthering the basic purposes of the First Amendment. Conversely, if this Court should hold, as the appellants seem to urge, that *Tilton* represents the outer limits of permissible aid to higher education and that nothing other than one-time construction grants may be allowed (either generally or to church-related colleges), then the inevitable consequence will be either to encourage capital improvement programs (and expansion) where they may not be needed or to effectively eliminate or curtail the availability of aid in periods of declining enrollment. Such artificial distortions of the growth and operation of institutions of higher learning would be neither religiously neutral nor educationally sound.

D. *The Resulting Relationship*

The third and final element of the entanglement analysis suggested in *Lemon v. Kurtzman* focuses on

[25] It was noted at trial that "[s]ome of these institutions are in desperate need to have repairs on buildings and updating laboratories. Other institutions are in desperate need of monies for their scholarship programs." (Tr. 1583).

[26] See W. McGill, *Federal Aid to Higher Education: Some Problems*, 28 Record of N.Y.C.B.A. 819 (1971).

"the resulting relationship between the government and religious authority." In this regard, appellants urge that the Maryland *annual* grant programs should be sharply distinguished from the *one-time* construction grant involved in *Tilton v. Richardson*. But this ignores the fact that, despite the one-time nature of grants under the *Tilton* program, *continuing* governmental oversight of the use to which the completed facility is being put is required. It is difficult to perceive why continuing dollar oversight should necessarily be any more entangling than continuing use oversight.

Indeed, comparing the entanglement possibilities of annual grants covering operating expense items with a single large grant or series of grants funding a capital facility which will be in use for years to come, one can perceive advantages to the former from both a primary effect and an entanglement perspective. In the case of an annual operating expense item, the funds are put to immediate and final use. Funds spent on 1975 operating expenses do not require any re-examination of the nature of the institution and its various programs as operated in 1976, not to mention 20 or more years later. In *Tilton* facilities funding, every dollar spent carries with it a long-term sectarian use prohibition and the correlative long-term oversight relationship. When aid monies are spent on annual operating items, that same relationship *may* continue from year to year but the stakes are smaller since prior years' grants are no longer involved. In addition, if an institution's basic nature changes to pervasively sectarian, it can thereafter be excluded from the aid program without the State's having to worry about prior grants spent on permanent facilities. Obviously, in each type of program some kind of continuing awareness and relationship is necessary. But the mere fact that grants are

made on an annual basis hardly increases the entanglement problems.

E. *The Resulting Relationship in Maryland*

As noted earlier, effective administration of Maryland's aid program and enforcement of the statutory prohibition against sectarian usage involves a three-step process:

1. Determination of eligibility;

2. Requirement of pre-expenditure certification of non-sectarian usage; and

3. Post-expenditure confirmation of non-sectarian usage.

The Maryland Council for Higher Education, which has assumed the principal responsibility for administering the program, is aided in its functioning at all three stages by the broad general knowledge and expertise which it has acquired relative to higher education in Maryland as a result of its other duties. The fact that this information is obtained wholly apart from the administration of the aid program substantially reduces the extent to which the aid program itself might generate excessive entanglement by virtue of frequent State inquiry and information gathering.[27]

It is not seriously suggested either that any institutions found eligible for the program in fact violate the eligibility standards or that the Council's determination

[27] After describing the type of information collected by the Council in performing these other responsibilities, the appellants make the incredible statement that "such church-state contacts are entangling and proscribed." (appellants' brief, pp. 40-41). To suggest that the collection of such information outside the context of a specific aid program is itself proscribed by the First Amendment is absurd and without authority. Appellants have cited none.

of eligibility entangles it with religion (J.S., p. A-47). Similarly, the Council's requirement of a pre-expenditure verification or certification of non-sectarian usage from the presidents of the various colleges is hardly an element of entanglement. The only part of the administering process which appellants seriously urge raises entanglement problems is the post-expenditure verification and oversight procedure.

Clearly the submission by a college president of the verified utilization of funds report reflecting the purposes for which the funds were expended and containing his certification that they were not expended for sectarian purposes poses no entanglement risk. According to appellants, the danger or potential for excessive entanglement lies in the necessity of the Council's confirming or verifying the report filed by the institution.

Consideration of the extent and nature of the verification called for should not occur in a vacuum. This was properly recognized by the lower court, which prefaced its conclusion that Maryland's enforcement procedures were "effective and non-judgmental" by the following observation:

> "Because of the nature of the recipient schools, there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education. Such governmental monitoring of the context of an educational program, especially on religious grounds, would raise grave questions. Concern over this potential government role was clearly the heart of the Supreme Court's entanglement analysis in the primary and secondary education cases." (J.S., p. A-18).

The findings of the lower court on the absence of excessive entanglement are clear and unequivocal:

> "The Council has shown no indication to enmesh itself unnecessarily in the recipients' affairs. The Act does not require administrative entangling, there is no entanglement in the present procedures, and no cause to speculate that the Council will redefine its responsibilities to create problems in the future." (J.S. p. A-49).

Essentially the process of confirming or verifying the accuracy of the reports submitted by the college presidents potentially calls for the Council to satisfy itself (1) that the funds were in fact spent on the programs or for the purposes reported by the colleges and (2) that those programs or purposes are not sectarian or religious in nature. The first determination was found to be quick, non-judgmental and not entangling (J.S., p. A-48). This finding belies any argument that a potential accounting relationship is necessarily entangling. If the accounting procedures required of and adopted by the institutions are totally inadequate to identify and permit ready verification of the flow of public monies, and if it is necessary for the State to conduct regular and extensive audits, then indeed the potential for excessive entanglement would be present. There is, however, simply no basis in the record below for any such determination and this Court should not speculate that such a situation may occur in the future either generally or in isolated cases.

Similarly, there is nothing in the record to indicate that excessive surveillance by the Council has occurred or ever will occur in connection with its usage verifications and its determinations that the programs or purposes for which the monies are spent are not sectarian. As noted, this is possible because of the

fundamental nature of the institutions in question and the fact that the usage reports filed by the colleges are and can be verified on the basis of the Council's general knowledge of each institution and any follow-up reports which the Council may require of particular institutions from time to time.

In short, the lower court was clearly correct and amply supported by the record in concluding that the Maryland aid program, while it may establish a continuing relationship between the Council and the State's private colleges, does not involve the State in excessive entanglement with religious institutions.[28]

F. *Political Entanglement*

This Court has previously suggested in *dicta* that the programs of aid to church-related schools may, under certain circumstances, raise constitutional questions if they have the potential for creating political divisiveness along religious lines. *Meek v. Pittenger,* ___ U.S. ___, 43 U.S.L.W. 4596, 4603 (May 19, 1975); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 794-98 (1973) and *Lemon v. Kurtzman,* 403 U.S. 602, 622-24 (1971). Not only is there no basis in the record here to suggest that Maryland's program of college aid has created such divisiveness or has the potential for doing so, but an examination of this Court's expressions of concern about the problem readily indicates that this issue simply is not presented here. This is so because Maryland's annual aid allocations are based on a set

[28] The lower court quite correctly observed that the relationship established between the state and the college aid recipient in *Hunt v. McNair,* 413 U.S. 734 (1973) was "far more intimate and pervasive than any relationship likely to result" under the Maryland program (J.S., p. A-21).

formula and not on open-ended and variable annual appropriations; because the vast majority of the institutions benefitting from the Maryland program have no church ties whatsoever; and because the institutions involved are not locally based primary and elementary schools with their roots in local communities and their student bodies consisting entirely of Maryland residents.

IV.

NO HOLDING OF FACIAL UNCONSTITUTIONALITY IS JUSTIFIED.

While the appellants' complaint filed below sought a declaration that the Maryland Act was unconstitutional both on its face and as applied, the appellants have glossed over these two distinctly different forms of relief in their brief here and appear to be urging that the Maryland Act and the entire aid program be declared facially unconstitutional. Such extreme relief is simply not justified.

The entire argument advanced by the appellants is based upon the premise that aid to the appellees is constitutionally invalid because of their nature as church-related colleges. But the appellee colleges are not the only beneficiaries of State aid. No serious question has been raised here concerning the eligibility of the other fourteen colleges and universities not parties to the appeal to continue receiving public funds. Any suggestion that the entire aid program should be stricken on the basis of individual practices at, or characteristics of, one or more of the appellee institutions is the grossest kind of overkill.

Recognizing the possibility that specific grants might be ruled invalid or that particular institutions might be held statutorily or constitutionally ineligible to participate in the program, the legislature included the clearest possible severability clause in § 69 of the Maryland Act:

> "If any parts of this subtitle, or any particular payments or payments to any particular types of institutions pursuant to this subtitle, shall be held to be invalid for any reason, such unconstitutionality or invalidity shall not affect the remaining parts of this subtitle, and shall not affect any other payments or payments to any other types of institutions pursuant to this subtitle, the General Assembly hereby declaring that it would have enacted the remaining parts of this subtitle or would have authorized the remaining payments or payments to remaining types of institutions, if such unconstitutionality or invalidity had been known; and to this end, all parts, sections, and parts of sections of this subtitle, and all administrative actions pursuant to this subtitle, are declared to be severable." (J. App. 14-15)

This Court's decisions clearly establish that such severability clauses must be honored so long as any portions of a statute which may be invalidated are not so fundamental that their removal would defeat the underlying purposes. *Champlin Rfg. Co. v. Commission*, 286 U.S. 210, 234 (1932); *Sloan v. Lemon*, 413 U.S. 825, 833-34 (1973). This principle applies equally even in the absence of a severability clause. *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971).

The only circumstance under which the Court could justifiably invalidate the entire Maryland aid program is if a substantial majority of the aid recipients were found to be constitutionally ineligible to receive State funds. *Sloan v. Lemon, supra*, at 833-34. Here the appellants only challenge the right of four out of eighteen statutorily eligible colleges to receive funds,

and one of those challenged is no longer in operation. Under these circumstances, *Sloan v. Lemon* commands respect for the explicit severability clause.[29]

V.

THE APPELLEE INSTITUTIONS SHOULD CLEARLY NOT BE REQUIRED TO REFUND MONIES RECEIVED BY THEM AND EXPENDED IN GOOD FAITH RELIANCE ON THE CONSTITUTIONALITY OF THE MARLAND ACT.

Appellants' claim only a refund of a single payment made to one institution in 1974 relative to its graduate degree program and of the later disbursement of previously escrowed funds made only after the lower court had held the aid program to be constitutional. If the lower court should be reversed and the program found unconstitutional as to one or more colleges, no refund should be required.

The first payment in question was made to Loyola College after the trial of the case below and the entry of the trial judge's findings of fact. The payment was based solely on graduate degrees awarded and the college certified that the funds would be used for non-sectarian purposes and *solely in connection with its graduate program*. This case, as filed, tried and decided, involves the college level programs of the institutions in question and not the graduate level programs. No evidence was introduced and no record was established with respect to graduate level programs. The belated

[29] In the event that less than all the appellee colleges are found by this Court to be of such a nature as to render them constitutionally ineligible to receive State monies, then the severability clause and this Court's recognition of the principle which it embodies should be adhered to so as to preserve the application of the aid program to both the remaining appellee colleges and the other fourteen colleges and universities not involved in this appeal.

and unsubstantiated request, first for injunctive relief and now for a refund of that payment, was and remains totally without merit.

The second and more recent series of payments involves the funds which the State, during the two year pendency of the proceedings below, withheld from the appellee institutions not under judicial restraint but out of a responsible sense of caution and concern. These funds were paid out only after the lower court's decision in favor of the constitutionality of the Maryland Act and after the denial of appellants' requests for injunctive relief pending appeal.

The issue of refund here is controlled by this Court's decision in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) [*Lemon II*]. In *Lemon II* this Court affirmed the refusal of the lower court to block payments which State officials proposed to make *after* the statute had been found *un*constitutional (in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)) but which represented reimbursement for educational services rendered before that decision. Notwithstanding the fact that the aid program there in question had been found *unconstitutional* prior to the payments, this Court ruled that State officials need not await the confirmation of a conclusive federal court ruling before implementing presumptively constitutional aid programs. As was said there:

> ". . . Until judges say otherwise, state officers — the officers of Pennsylvania — have the power to carry forward the directives of the state legislature. Those officials may, in some circumstances, elect to defer acting until an authoritative judicial pronouncement has been secured; but particularly when there are no fixed and clear constitutional precedents, the choice is essentially one of political

discretion and one this Court has never conceived as an incident of judicial review." 411 U.S. at 208.

Here the State did defer payment for a reasonable time and acted only following the favorable judicial pronouncement of a three-judge District Court. There is no reason whatsoever for disturbing that action.

The only distinction between the situation here and that presented in *Lemon II* is that, as noted there by the Court, the appellants in *Lemon II* had not sought injunctive relief pending appeal, thus allowing the Pennsylvania aid program to operate during the pendency of the appeal. The fact that the appellants here did seek (and were denied) such injunctive relief should not be considered as a controlling distinction. Of far greater importance is the application of the three basic factors which the *Lemon II* opinion suggests should control any refund determination (411 U.S. at 201-207):

1. Would any significant constitutional evils found in the Maryland program accrue if refund is not ordered?

2. Have the aid recipients relied to their detriment on their right to receive and expend the funds in question?

3. Was any ultimate ruling of unconstitutionality so clearly foreshadowed that the State could be said to have acted in bad faith in making the payments pending appeal?

Application of these criteria compels a conclusion that any refund would be altogether inappropriate here. The discussion on this point at pp. 91-93 of the brief filed on behalf of Loyola and Mount St. Mary's Colleges

is thorough and persuasive. Clearly, no conceivable constitutional evil which may be found to lurk in Maryland's aid program will be corrected by a refund, nor can it be demonstrated that any such evil will have been furthered by the payment and use of these particular monies. The reliance of the appellee colleges on their right to receive and expend the grant funds is undeniable, as is the harm they would suffer should a refund be ordered now. And the opinion of the lower court itself demonstrates the futility of any contention that a contrary result was *clearly* foreshadowed by prior decisions. Indeed, it is difficult to conceive how any decision in this uncertain First Amendment area can be characterized as clearly foreshadowed when this court has repeatedly acknowledged that the underlying tests are "not easily applied", the issues are "ones of degree" and the underlying principle of neutrality involves adherence to a "blurred, indistinct, and variable barrier."

In our view, this Court should follow its admonition in *Lemon II* that the validity of prior state action should only be made to turn on subsequent federal court rulings under the most unusual of circumstances:

> "Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislators and executive officials alike." 411 U.S. at 207-08.

CONCLUSION

For the reasons stated above, it is respectfully urged that Maryland's college aid program does not offend the First Amendment. The judgment of the District Court should be affirmed and all relief prayed by appellants should be denied.

Respectfully submitted,

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